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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 420

BANCO DO BRASIL, S. A., *Petitioner,*

v.

A. C. ISRAEL COMMODITY CO., INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of Special Term of the Supreme Court, New York County, which granted a motion by respondent to vacate the warrant of attachment and the levies made thereunder, is reported at 29 Misc. 2d 229, 215 N. Y. S. 2d 3 (R. 64-67).[1] The order of the Appellate Division, First Department, which unanimously affirmed that lower court's order without opinion, is reported at 13 App. Div. 2d 652, 216 N. Y. S. 2d 669. The order of the Appellate Division, which granted leave to appeal to the New York Court of Appeals, is reported at 13 App. Div. 2d 912, 218 N. Y. S. 2d 545. The opinion of the Court of Appeals of the State of New York and the dissenting opinion (App.

[1] The "R." references are to the pages of the Papers on Appeal from Order which constituted the record in the New York Court of Appeals.

A of Petition), which affirmed the decision below, are reported at 12 N. Y. 2d 371, 239 N. Y. S. 2d 872, 190 N. E. 2d 235.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U. S. C. § 1257(3). The jurisdictional requisite is not satisfied since the Petitioner does not seek the review of a judgment or decree that is final, but of one that is interlocutory, namely, the affirmance of the vacatur of a warrant of attachment, a provisional remedy (Petition pp. 1-2).

Questions Presented

1. Whether 28 U. S. C. § 1257(3) permits this Court to review the affirmance of the vacatur of a warrant of attachment, particularly where an appeal by Petitioner is pending from a dismissal of its complaint in the same case.

2. Whether the International Monetary Fund Agreement has abrogated New York's public policy against the affirmative enforcement by action in its courts of claims based upon foreign revenue laws, not reduced to judgment.

Statement

Petitioner Banco do Brasil, S. A. ("Banco") obtained a warrant of attachment from the Supreme Court of New York, New York County, against the property of Respondent A. C. Israel Commodity Co., Inc. ("Israel") and others (R. 11-15) based upon a verified complaint (R. 17-28) and three affidavits (R. 29-63).

The gravamen of Banco's complaint is that certain exporters of coffee in Brazil and certain importers of coffee in this country conspired to evade Brazil's foreign ex-

change laws and regulations (actually a coffee export tax), the former by failing to assign to Banco in Brazil the dollar proceeds from Brazilian coffee exports and the latter, among them Israel, by purchasing said coffee in New York City at a reduced price with knowledge of the Brazilian exporters' violation of the Brazilian export requirements. Banco, a quasi-governmental agency of Brazil, thus contended that it may sue Israel in New York to recover damages for the alleged violation of Brazil's foreign exchange regulations. There is no claim that Israel participated in the alleged illegal export.

Israel, a Delaware corporation (R. 18) with its principal office in New York City (R. 9), appeared generally in the action (R. 9) and, before answering, moved to set aside the warrant of attachment on the ground, among others, that the application for the warrant failed to state a cause of action in that it would require the enforcement of fiscal measures of Brazil, which is against public policy of New York (R. 7-8). The court of first instance considered the following issue to be determinative of the motion:

> "The question presented in the instant case is whether or not the Bretton Woods Agreement and the cases cited above justify this court in granting a warrant of attachment upon an action in which plaintiff seeks affirmative relief based on foreign currency regulations which were not heretofore enforceable in the courts of this state." (R. 66).

The court concluded that Banco had failed to show a cause of action (R. 67) and vacated the warrant of attachment (R. 5-6).

The order was unanimously affirmed by the Appellate Division of the Supreme Court of New York, First Department, on April 25, 1961 (R. 73-74). Banco there-

upon applied to the Appellate Division for leave to appeal to the Court of Appeals, which was granted on certified questions of law (R. 75-77), as prescribed for appeals from interlocutory orders by New York Civil Practice Act §589.

The Appellate Division certified the following questions to the Court of Appeals (R. 76):

> "1. Does the plaintiff's complaint state facts sufficient to constitute a cause of action?
>
> "2. Was the order of this court entered April 25, 1961, which affirmed an order of the Supreme Court of the State of New York entered on the 28th day of March, 1961, properly made?"

The Court of Appeals affirmed the decision below and answered the first of the certified questions in the negative and the second in the affirmative. This is the order which Banco seeks to have reviewed here.

In the meantime, further proceedings in this same action were had in the lower courts of the State of New York. On April 6, 1961, Israel moved in the Supreme Court, New York County, for judgment on the complaint on the ground, among others, that the complaint failed to state facts sufficient to constitute a cause of action (S.R.).[2] By order of May 19, 1961 the motion was granted and the complaint was dismissed (S.R.). The opinion (New York Law Journal, May 17, 1961, p. 14, col. 6) (Appendix A) was based on the order vacating the warrant of attachment and its affirmance by the Appellate Division (S.R.). Banco filed a notice of appeal from the order dismissing the complaint (S.R.). This appeal is now pending.

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[2] S.R. denotes the supplemental record filed by Respondent to demonstrate this Court's lack of jurisdiction under 28 U. S. C. §1257(3), an issue not before the New York Court of Appeals.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI UNDER THE SECTION INVOKED BY PETITIONER.

Banco invokes this Court's juridiction under 28 U.S.C. §1257(3) which provides that certain "final judgments or decrees rendered by the highest court of a State" may be reviewed here (Petition p. 2). This Court lacks jurisdiction thereunder because the judgment below doe. not have the requisite finality under §1257.

A decision is final only when it ends the litigation by fully determining the rights of the parties, and nothing remains to be done in the state court except for the ministerial act of entering judgment. *Department of Banking* v. *Pink*, 317 U. S. 264, 267-8 (1942). The decision below only vacated a provisional remedy, the warrant of attachment.

A state court decision on a provisional remedy is not final, and is not reviewable by certiorari, even though under state law it has become the law of the case and thus determines the final outcome. *Georgia Ry. & Power Co.* v. *Town of Decatur*, 262 U. S. 432, 436-7 (1923).

This court refuses to review interlocutory decrees *Montgomery Building & Constr. Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178 (1952). The appeal to the Appellate Division, an intermediate court of appeals, from the order dismissing the complaint is now pending. Thus, the order, review of which is sought herein, is interlocutory. It will not end the litigation nor permit the entry of judgment. Accordingly, certiorari should be denied.

II

THE PETITION FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Court of Appeals of New York held it was against New York's public policy to accept jurisdiction of the cause of action pleaded by Banco, because it would involve the affirmative enforcement by action of a foreign revenue regulation. This decision followed long-established precedent under the common law and the law of New York. *Government of India v. Taylor*, [1955] 1 All E.R. 292 (H. L.) *affirming Re Delhi Electric Supply & Traction Co., Ltd.*, [1953] 2 All E.R. 1452 (C. A.); *City of Philadelphia v. Cohen*, 11 N. Y. 2d 401, 230 N. Y. S. 2d 188, 184 N. E. 2d 167, *cert. denied*, 371 U. S. 934 (1962); 1 OPPENHEIM, INTERNATIONAL LAW, §144b (7th ed. Lauterpacht, 1948).

The wisdom of this policy of New York is not at issue. Review should be granted only if a substantial claim is made that this public policy violates Petitioner's right under the Constitution or a statute or treaty of the United States. 28 U. S. C. 1257(3). Banco having failed to make any such showing, this Court should not abrogate New York's public policy and permit Banco affirmatively to enforce Brazilian fiscal law by action in the New York courts.

Banco argues that New York's public policy has been abrogated by the spirit of the Articles of Agreement of the International Monetary Fund, December 27, 1945, 60 Stat. 1401, T. I. A. S. No. 1501 ("the Agreement" or the "Bretton Woods Agreement"), parts of which were enacted into law by the Bretton Woods Agreements Act, 59 Stat. 512 (1945), 22 U. S. C. §§286-286k-1. Israel submits that this contention is without merit and that no substantial federal question is presented.

(a) The Agreement is not self-executing.

Treaties entered into by the United States do not automatically become part of its internal law. Unless a treaty is "self-executing", only such parts of it as are specifically enacted by Congress in the form of a statute bind our courts. *United States v. Arredondo*, 31 U. S. (6 Pet.) 691 (1832); *Foster v. Neilson*, 27 U. S. (2 Pet.) 253 (1829).

Whether a treaty is self-executing depends on the treaty and on the intention of Congress when it approves the treaty. The Bretton Woods Agreement is not self-executing. Article IX of its text, which deals with the status, immunities and privileges of the International Monetary Fund (that is, matters which might require adjudication by the courts of the signatories), contains a special provision that "each member shall take such action as is necessary in its own territories for the purpose of making effective in terms of its own law, the principal set forth [in Article IX] * * *" (Article IX, §10).

When Congress enacted the Bretton Woods Agreements Act, 59 Stat. 512, 22 U. S. C. §286, authorizing the President to accept membership in the International Monetary Fund, it specifically provided which sections of the Agreement were to become internal law. §11 of the Act, 59 Stat. 516, 22 U. S. C. §286h reads:

> "The provisions of article IX, sections 2 to 9, both inclusive, and the first sentence of article VIII, section 2(b), of the Articles of Agreement of the Fund * * * shall have full force and effect in the United States and its Territories * * *".

If the Agreement were to have been self-executing, both Article IX, §10 of the Agreement and the above-quoted provision of the Act would have been superfluous. The Agreement was not intended to be self-executing. Our

courts are bound only by those sections of the Agreement which were enacted into internal law. See Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421, 423 (1950).

(b) The provisions of the Agreement which have become the internal law of the United States do not support Petitioner's claim.

In order to prevail Banco must show that some provision of the enabling statute or the treaty which has become internal law overrides the public policy of New York. This the petition does not do.

None of the provisions enacted into law by the Bretton Woods Agreements Act, *supra*, have any bearing here. Article IX, §§2-9 deal with the status, the immunities and the privileges of the International Monetary Fund. They do not apply.

Banco argued in the New York courts that Article VIII, §2(b) (the only other provision specifically enacted into law) permits it to bring this action. §2(b) reads as follows:

> "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement."

Banco has abandoned its contention below that §2(b) requires the affirmative enforcement by action of the foreign exchange laws of every Bretton Woods signatory and that §2(b) is applicable to this case (Petition pp. 25-

27). Banco concedes the point argued by Israel below and approved by the New York courts that the only effect of §2(b) is to make certain contracts unenforceable in the courts of signatory states. This is the official interpretation of §2(b) by the International Monetary Fund, 14 FED. REG. 5298-09 (1949); see comment by Andre van Campenhout, former General Counsel of the International Monetary Fund, in Note, 2 AM. J. COMP. L. 389 (1953) where he points out (at 391) that according to the official interpretation of the International Monetary Fund, Article VIII, §2(b) makes certain exchange contracts unenforceable but that "the judicial or administrative authorities are not bound to treat such contracts as invalid or in any other way penalize the making or performance of them."

Banco does not claim contracts with any of the defendants. Even if it had, the only effect of the Bretton Woods Agreement would be that courts would sustain a defense of illegality of the contract in a contract action. Bretton Woods does not require our courts to award damages to a foreign government or its agencies, especially where such action is against the public policy of the forum.

(c) The Agreement does not require that New York affirmatively enforce foreign exchange regulations.

Banco is unable to cite a specific provision of the treaty or the enabling act which would require our courts affirmatively to enforce Brazil's exchange regulations. It asks that this effect be ascertained from the spirit of the entire agreement. On the contrary, the spirit of Bretton Woods is hostile to exchange regulations, for one of its purposes is to assist "in the elimination of foreign exchange restrictions which hamper the growth of world trade" (Art. I

(iv)). The Agreement recognizes exchange restrictions only as a necessary evil to be eliminated "as soon as conditions permit" (Art. XIV, §2).

The petition documents profusely but irrelevantly the importance of the Agreement in international fiscal policy and stresses in general terms the duty of the signatories to cooperate in solving international monetary problems. That importance is not an issue in this case. The question here is whether our courts must, under the terms of the Agreement, permit other countries to sue in our courts to collect damages for alleged violations of their currency regulations. In spite of the detail with which the Agreement lays down the duties of the signatories, Banco has not been able to point out one provision which has any bearing on this point. The provisions of the Agreement, with the sole exception noted above, do not even deal with private legal relationships. They do not pretend to create, abolish or modify rights or liabilities of private parties; they deal exclusively with financial and monetary dealings on an intergovernmental level.

Neither can Banco cite any case, anywhere which has permitted such an action to be brought by a foreign country. The conclusion is unavoidable: no such duty to permit recovery of damages in the courts of another country for a violation of currency regulations was intended to be imposed on the countries adhering to the Bretton Woods Agreement. See Meyer, *Recognition of Exchange Controls after the International Monetary Fund Agreement*, 62 YALE L. J. 867 (1953). The author states at 895:

> ". . . . no member need take any positive action to police or enforce another's regulation. So, for example, there is no obligation on a member to procure payment to another member of funds in the former's territory which the latter's regulations

> purport to vest—even though the same regulations render unenforceable the contract under which the funds are held."

This conclusion is suported by the fact that a proposal to make an agreement which is contrary to the exchange regulations of a member country an "offense" was defeated at Bretton Woods (1 PROCEEDINGS AND DOCUMENTS OF THE UNITED NATIONS MONETARY AND FINANCIAL CONFERENCE, 334, 341, 502, 543, 576—referred to in Nussbaum, *Exchange Control and the International Monetary Fund*, 59 YALE L. J. 421, 426, 429 (1950)).

The omission from the Agreement of any duty to prosecute or to permit foreign countries to sue for the alleged violation of foreign exchange regulations is based on sound practical considerations. Many of such exchange laws are extremely detailed and complicated. The exact extent and validity of such laws are many times questioned even within the foreign jurisdiction. If they were enforceable here, our courts would have to decide the validity of such laws under foreign constitutions and, indeed, whether such laws were consonant with our own notions of what is proper. See the concurring opinion of Judge Learned Hand in *Moore v. Mitchell*, 30 F. 2d 600, 604 (2d Cir. 1929), *aff'd*, 281 U. S. 18 (1930).

For example, it appears arbitrary that coffee exporters should receive from Banco only 90 cruzeiros for each United States dollar assigned to said Bank while, by Banco's admission, the value of the dollar on the free market in Brazil was then 220 cruzeiros (R. 24, 32-35). Indeed, Banco's brief in the New York Court of Appeals (p. 39, Appendix B) apparently characterized this as confiscatory when it cited a press release of the International Monetary Fund which spoke of the "amounts which coffee

exporters are now required to surrender without compensation." In *Bank voor Handel en Scheepvart N. V. v. Slatford*, [1953] 1 Q. B. 248, 258, Mr. Justice Devlin (as he then was) expressed the view that, "Presumably any decree which did not provide for full compensation would be held to be confiscatory".

To obligate the courts of this country to pass upon the validity of the fiscal policy and revenue measures of all Bretton Woods signatories would burden our courts and the international relations of the United States. Furthermore, to argue that the Agreement as a whole has created law binding on the courts beyond the provisions specifically enacted denies the express intent of Congress. Congress enacted only the first sentence of Section 2(b), the unenforceability provision, and deliberately omitted the second sentence, which permitted additional cooperation by mutual accord of the signatories. 22 U. S. C. §286 h. There is no further or different obligation for the judicial recognition of exchange control regulations. Only the federal government can now effect the type of mutual accord therein contemplated. If this court were to find a duty of additional cooperation where no such further accord was entered into by the other branches of the federal government, it would invade the prerogative of the executive and legislative branches in the field of international relations.

III

THERE IS NO CONFLICT OF DECISION.

Banco asserts that the decision of New York's Court of Appeals is contrary to this Court's interpretation of Bretton Woods as enunciated in *Kolovrat v. Oregon*, 366 U. S. 187 (1961), and that it ignores this Court's opinions concerning a state's powers and duties as expressed in three other cases. Petitioner's reliance is misplaced.

United States v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936), concerns the respective powers of Congress and of the President in foreign affairs. *United States* v. *Pink*, 315 U. S. 203 (1942), and *United States* v. *Belmont*, 301 U. S. 324 (1937), deal with the express assignment to the United States of certain rights acquired by the Russian Government by expropriation and the recognition of such transfer of title by New York.

No provision of the Agreement has any bearing upon the issues herein. Even if there were such a provision, it would have to be construed, if at all possible, so as not to derogate from the authority of a state. This Court so held in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143 (1938), where it said:

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. *United States* v. *Arredondo*, 6 Pet. 691, 748; *Haver* v. *Yaker*, 9 Wall. 32, 34; *Dooley* v. *United States*, 182 U. S. 222, 230; *Nielsen* v. *Johnson*, 279 U. S. 47, 52; *Todok* v. *Union State Bank*, 281 U. S. 449, 454."

How can it then be argued that the mere spirit of a treaty has abolished a state's public policy? See also *United States* v. *Pink*, 315 U. S. 203, 230 (1942).

Kolovrat v. *Oregon*, 366 U. S. 187 (1961) does not support Banco. *Kolovrat* held that, under an 1881 Treaty between the United States and Serbia, Yugoslavian claimants were entitled to take under an Oregon intestacy, and that the treaty right had not been impaired by Yugoslavia's foreign exchange laws. This Court noted that Oregon state policy, as enunciated by a law forbidding the inheritance of Oregon property by an alien living in a foreign country whose law creates doubt or uncertainty

concerning reciprocal inheritance rights of Americans, could not be applied to Yugoslav citizens in view of the Bretton Woods Agreement which (*inter alia*) forbids participants (including Yugoslavia) from restricting payments for current transactions or from delaying transfers of funds in settlement of commitments; Article 8 of a Yugoslavian law which expressly recognizes the authority of the provisions of agreements with foreign countries which are concerned with payments; and an Agreement of 1948 which obligates Yugoslavia to continue to grant most-favored nation treatment to Americans in the ownership and acquisition of assets in Yugoslavia and requires Yugoslavia to authorize the payment of debts to United States nationals and, so far as feasible, to permit dollar transfers for such purpose. These agreements, coupled with our continuing adherence to the 1881 Treaty, precluded Oregon from deciding that Yugoslavian laws meeting the standards of those agreements could be the basis for defeating rights conferred by the 1881 Treaty. *Kolovrat* has no application here.

Banco has no existing rights, such as the 1881 Treaty created, confirmed by subsequent agreements such as the 1948 Treaty, which rights a state seeks to divest on grounds of public policy. On the contrary, we have existing public policy which Banco seeks to overturn in reliance upon foreign public law. This is not the teaching of *Kolovrat*.

Finally, there is nothing in the dissent below which supports Banco's claim that the impact of the Bretton Woods Agreement on this case presents a substantial federal question or that the majority view conflicts with federal decisional law. The dissenting opinion discussed New York law and New York public policy. It suggested that, in view of the Bretton Woods Agreement, New York

should change its well-established public policy against enforcement of foreign revenue measures and that, in any case, this policy is not applicable to the present case in which a tortious fraud and conspiracy is alleged. Neither the suggested change in New York's public policy, rejected by the Court of Appeals, nor its interpretation of the complaint presents a federal question. Nowhere does the dissent even hint at raising an issue under the supremacy clause of the Constitution.

Conclusion

The Bretton Woods Agreement neither requires nor justifies a change in New York's public policy; it does not compel our courts to enforce affirmatively by an action for damages a 59% Brazilian coffee export tax imposed in the guise of a foreign exchange regulation. The Agreement did not engraft the fiscal law of all its signatories upon New York's domestic law.

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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September, 1963

APPENDIX A

Opinion of Mr. Justice Gold of the Supreme Court of New York, N. Y. L. J., May 17, 1961, p. 14, col. 6.

Banco Do Brasil, S. A., v. A. C. Israel Commodity Co., Inc.—The several defendants by five separate motions have moved for dismissal of the complaint. Relief is sought severally under Rules 106 and 107 and General Corporation Law, section 225. Heretofore on motion of the defendant A. C. Israel Commodity Company, Inc., warrant of attachment was vacated upon the issues arising under both Rules 106 and 107 with respect to the sufficiency of the cause as it relates to plaintiff's attempt to recover a penalty or damage sustained by reason of violation of foreign exchange regulations (N. Y. L. J., Nathan, J., March 29, 1961). It was held that:

> "It is clear from the language of section 2(b) that before the provisions and purposes of the Bretton Woods agreement can be *affirmatively* enforced in the courts of this country, it is necessary that additional accord be entered into between this country and other signatory nations. No such additional accord between the United States and Brazil has been indicated in the papers submitted. In the absence of such accords, it is the opinion of this court that the existence of a cause of action has not been shown, as required by section 902 of the Civil Practice Act (Zenith Bathing Pavilion v. Fair Oakes S. S. Corp'n, 240 N. Y. 307).
>
> "Moreover, it appears on the face of the moving papers upon which the attachment was obtained that the computation of plaintiff's alleged damages depends upon the internal currency regulations of Brazil which, as indicated above, are not enforceable in the instant action."

The Appellate Division affirmed the order of vacatur. Whether a cause of action may be asserted against some of the defendants under General Corporation Law section 225 is not now material for such a cause if available to plaintiff must be one which is maintainable upon an enforceable claim. There is no need or reason to withhold determination by reason of the pending application for leave to appeal to the Court of Appeals. All motions are granted. Settle order.